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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

MICHAEL LYNN SMITH,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the
United States Court of Appeals For the Sixth Circuit

BRIEF OF AMICUS CURIAE TENNESSEE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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I. INTEREST OF AMICUS CURIAE

The Tennessee Association of Criminal Defense Lawyers (TACDL) is a nonprofit corporation chartered in 1973. It is an association composed predominantly of lawyers actively engaged in the representation of criminal defendants and committed to promoting justice and the common good. TACDL became involved in this case as amicus in the court of appeals because of the threat to fair trials posed by the government's practice of requiring security clearances for judicial staff and defense counsel in cases litigated under the Classified Information Procedures

Act (CIPA). In the court of appeals, TACDL filed a 38-page brief and extensive addendum containing relevant statutes, unpublished orders, legislative and regulatory history and other materials. With permission, counsel for TACDL argued the case for appellee (petitioner in this Court) in the court of appeals. Written consents obtained from counsel for the petitioner and from the Solicitor General for the United States are attached hereto as an Addendum.

II. SUMMARY OF ARGUMENT

Amicus fully supports the reasons for granting the writ that were articulated in the Petition. In addition, amicus would emphasize those factors (in addition to the importance of the constitutional and regulatory issues involved) that especially warrant the exercise of the Court's discretionary certiorari jurisdiction. In particular, we point out that (1) structural factors in the CIPA statute, in the CIPA defense bar, and in the district courts have inhibited appellate review of the recurring problem presented by this case, and (2) this Executive intrusion into judicial independence poses a direct threat to individual liberties.

III. ARGUMENT: REASONS BY AMICUS URGES THE COURT TO GRANT THE WRIT

A. Structural Factors Have Heretofore Frustrated Appellate or Certiorari Review and Will Continue to Inhibit Review

Since the enactment of CIPA[1] in 1980 and the consequent promulgation of its Security Procedures[2] in 1981, CIPA's unilateral interlocutory appeal provision[3] effectively has insulated government security procedure practices in the district courts from appellate court supervision. Those practices have included a routine insistence that protective orders issued under CIPA §3 contain requirements that both judicial staff and defense personnel (including both defense counsel and other persons, such as witnesses, associated with the defense) undergo security clearance by the government. *See, e.g.*, Proposed Protective Order submitted Oct. 18, 1988 in the district court, R.11, excerpted in the Petition at 5-6.

With few exceptions,[4] the district courts faced with such proposed orders routinely have approved them. The reasons why

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[1] Classified Information Procedures Act, Pub.L. 96-456, 94 Stat. 2025, 18 U.S.C. App. IV.

[2] Security Procedures Established pursuant to Pub.L. 96-456, 94 Stat. 2025, by the Chief Justice of the United States for the Protection of Classified Information, 18 U.S.C.A. App. IV §9 note (Supp. 1990).

[3] CIPA §7, 18 U.S.C. App. IV §7.

[4] Proposed orders containing such requirements were rejected by the district courts in favor of orders similar to that in the instant case in *United States v. Poindexter*, et al., No. 88-0080 (D.D.C.) and *United States v. Fernandez*, No. 88-0236 (D.D.C.). In both cases, the judges' staffs apparently underwent screening procedures voluntarily. *See, e.g., Poindexter* Transcript of Hearing, Petition at A-31-33.

the district courts have adopted these orders appear to spring from a vicious cycle whereby questionable practice has become precedent by repetition.

First is the composition of the CIPA defense bar. A large percentage of CIPA cases are tried in the judicial districts inside the Beltway (District of the District of Columbia, District of Maryland, Eastern District of Virginia), reflecting the locations of those military, intelligence and related civilian institutions in which classified information is concentrated. In consequence, the CIPA defense bar tends to be concentrated among a group of former assistant United States attorneys in these judicial districts (or assistant attorneys general) who themselves have undergone "clearance" as government lawyers prosecuting CIPA cases.

These lawyers (now functioning as defense counsel) naturally tend to accept security clearance as a normal condition of participation in a CIPA case; even if in their new roles they now questioned the propriety of these measures, security clearance in their own cases would appear to be a moot point, as their continued clearance is presumably virtually assured. It also seems likely that the presumptively "cleared" status of these members of the CIPA defense bar offers cleared counsel a competitive advantage over other counsel in the view of an accused seeking prompt representation. *See* Tamanaha, *A Critical Review of the Classified Information Procedures Act*, 13 Am. J. Crim. L. 277, 287-90 (1986).

With the attorneys for both sides usually accepting of the general necessity for CIPA security clearances, it is little wonder that many district courts have uncritically accepted the intrusion of having their own staffs (including law clerks) subjected to security investigations. Once the government decides to invoke CIPA, a district court shortly is visited by one or more Court Security Officers, who hold joint appointments in the Justice Department and the judiciary. These officers have routinized

the security practices (including security clearance applications) in CIPA cases. At the same time, the district court is presented with a proposed protective order, accompanied by assurances from the government that identical orders have been adopted by a number of other district courts in other CIPA cases. Absence of the customary adversarial testing of the government's position, coupled with the judicial imprimatur represented by the advent of the Court Security Officers and the "model" orders, has had predictable results.

The government's success in the district courts has been amplified by the unilateral interlocutory appeal afforded the government by CIPA §7. Before final judgment, defendants have no appeal of right on CIPA issues. After final judgment, CIPA-issue appeals by acquitted defendants are moot; and counsel for convicted defendants would be unlikely to concentrate their efforts on an issue upon which it may be difficult to demonstrate prejudice to the defendant.

Thus rulings adverse to the defendant are unlikely to be raised on appeal at any stage. The government, on the other hand, has been free to choose between those instances in which it elects to appeal pretrial (as in this case) and those in which it simply accepts an adverse district court ruling without seeking appellate reversal. *E.g.*, *Poindexter* and *Fernandez, supra* n.4.

Under these circumstances, the fact that the instant case represents the first appellate precedent on the propriety under CIPA of Executive clearance of Judicial personnel should not deter the Court from exercising certiorari jurisdiction to effectuate supervisory control over aberrant district court practices.

The issue in this case simply is one in which the usual accumulation of precedent in the courts of appeals cannot be expected.[5]

B. The Threat to Separation of Powers is Immediate and Individualized

Finally, amicus would emphasize that the intrusion on judicial independence sanctioned by the court of appeals in this case is of very practical impact on the reality and perception of a criminal defendant's right to a fair trial under the Fifth and Sixth Amendments. As this Court recognized in *Commodity Futures Trading Comm'n. v. Schor*, 478 U.S. 833, 848 (1986), potential domination of the historically weak Judicial branch by the Executive implicates as a matter of the separation of powers not only the institutional interest of the judiciary but equally the individual litigant's interest in "independent and impartial adjudication" guaranteed by Article III, §1.

As the district court correctly observed, to permit the Department of Justice a "voice in selection of court personnel dealing with a case in which it is a party offends the most elementary notions of fair play and impartial justice." Petition at A-15, 706 F. Supp. at 595. This sensitivity to the reality and appearance of impartiality[6] must be all the more heightened in a criminal case

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[5] The court of appeals' ruling that the issue of who has the "final authority" to determine which judicial employees may have access to classified information after security clearance investigations have been performed is not "ripe for review" ignores the language of CIPA Security Procedure §4, the practical realities of security investigation, and the record in this case: "Any problem of security . . . shall be referred to the court for appropriate action," CIPA Security Procedure §4; the person with "final authority" over the outcome obviously will have an influence over the scope of the investigation; and the prosecutor in this case was involved in the scope of the investigation of defense counsel. *See* Petition at 14 & n. 7, A-34.

[6] Impartial adjudication, including the appearance of impartiality, has been held by this Court also to have roots in the due process clause. *See Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 864 & n.12 (1988); *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, 825 (1986).

under CIPA, in which the defendant's liberty is at stake and the court plays an often pivotal role in deciding the nature and form of classified information that may be used as evidence either by the prosecution or the defense.

The immediacy of this threat to individual liberties and to the integrity of the judicial process warrants the intervention of this Court. This is an instance in which "the Constitution has committed to another agency of government [the judiciary] the autonomous determination of the issue raised [selection of personnel for participation in a given case]," and judicial review is both essential and prudential. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1, 7-8 (1959). This is not an instance in which the judiciary can afford to stand by while the other branches resolve their collision using primarily political weaponry. "Judicial tolerance" of Executive predominance in areas of national security must find its limits at the unacceptable erosion of individual liberties. *See* P. Koh, *The National Security Constitution* ch. 6, 9 (1990); J. Choper, *Judicial Review and The National Political Process: A Functional Reconsideration of the Role of the Supreme Court* 217-315 (1980).

III. CONCLUSION

For the reasons stated above, amicus urges the Court to grant the Petition for a Writ of Certioari to the Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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Amicus Committee

ADDENDUM

ADDENDUM 1

U.S. Department of Justice
Office of the Solicitor General
Washington, D.C. 20530

August 1, 1990

Edmund L. Carey, Jr., Esq.
Neal & Harwell
2000 One Nashville Place
150 Fourth Avenue, North
Nashville, Tennessee 07219-2417

Re: *Smith v. United States*, No. 90-58

Dear Mr. Carey:

This is in response to your letter of July 31, 1990.

On behalf of the United States I hereby consent to the filing of a brief *amicus curiae* on behalf of Tennessee Association of Criminal Defense Lawyers in the above case.

Sincerely,

/s/ Kenneth W. Starr
Solicitor General

ADDENDUM 2

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August 9, 1990

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RE: Michael Lynn Smith vs. United States
United States Supreme Court No. 90-58

Dear Ted:

This letter will serve to confirm that Michael Lynn Smith, Defendant in the above styled and numbered cause, is amenable to and hereby agrees to your filing an amicus curia brief on behalf of Tennessee Association of Criminal Defense Lawyers.

Thank you for your interest in this case and I look forward to working with you thereon.

With warmest, personal and professional regards, I remain

Very sincerely yours,

/s/ N. Reese Bagwell

NRB:cc